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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1510

HON. DAVID ROSS, Administrative Judge of the Criminal Court of the City of New York; THE CRIMINAL COURT OF THE CITY OF NEW YORK; FRANK S. HOGAN, District Attorney, New York County; and GEORGE F. McGRATH, New York City Commissioner of Correction,

Petitioners,

—against—

STEPHEN RADICH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Hon. David Ross, Administrative Judge of the Criminal Court of the City of New York; The Criminal Court of the City of New York; Frank S. Hogan, District Attorney, New York County; and George F. McGrath, New York City Commissioner of Correction,

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—against—

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix "A" of Petition) is not yet reported. The opinion of the United States District Court for the Southern District (Appendix "B" of Petition) is not yet reported.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1) Whether an equal division of this Court which results in an affirmance of a State court conviction is an actual adjudication of Federal constitutional issues within the meaning of 28 U.S.C. Section 2244(c) and bars consideration of those issues in a habeas corpus proceeding?

2) Whether 28 U.S.C. Section 2109, which requires that where the Supreme Court lacks a quorum it affirm the judgment of the court below "with the same effect as upon affirmance by an equally divided court," demonstrates the intent of Congress to exclude such affirmances from the conclusive presumption given only to actual adjudications under 28 U.S.C. 2244(c)?

Statutes Involved

Section 2244(c) of Title 28 of the United States Code:

> (c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and

controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

Section 2109 of Title 28 of the United States Code:

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

Statement

Respondent Stephen Radich was convicted in the Criminal Court of the City of New York on May 5, 1967 of casting contempt on the American flag in violation of what was then Section 1425(16)(d) of the New York Penal Law, now Section 136(d) of the New York General Business Law.

Radich's conviction was based upon an exhibition of certain sculptures termed "constructions" in his second floor art gallery. *People* v. *Radich*, 53 Misc. 2d 717, 279 N.Y.S.2d 680 (1967). He was sentenced to pay a $500 fine or serve 60 days in the workhouse.

The Appellate Term, First Judicial Department, of the Supreme Court of the State of New York affirmed without opinion (57 Misc. 2d 1082, 294 N.Y.S.2d 285 (1968)). The New York Court of Appeals affirmed the conviction on February 8, 1970, 26 N.Y.2d 114, 308 N.Y.S.2d 846, by a 5-2 vote.

Radich then appealed to the Supreme Court of the United States on May 18, 1970. Probable jurisdiction was noted on October 19, 1970. *Radich* v. *New York*, 400 U.S. 864. Before this Court he argued, as he had in the State courts, that his conviction violated the First and Fourteenth Amendments to the Federal Constitution for reasons, *inter alia*, that the statutory prohibition against casting contempt on the flag violated the First Amendment because to "cast contempt" means to communicate an idea or attitude and the statute therefore is directed specifically against communication. He also argued that the statute under which he was convicted was overbroad and violated the equal protection clause.

This Court "affirmed by an equally divided Court", *Radich* v. *New York*, 401 U.S. 531 (1970), Mr. Justice Douglas not participating. Thereafter Radich applied for a writ of habeas corpus in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §2241 *et seq.* The Court, by Canella, *J.*, denied relief on the ground that 28 U.S.C. §2244(c) barred federal habeas corpus relief because the equally divided Supreme Court affirmance of the State court conviction constituted an actual adjudication of the merits of the constitutional claims then before the District Court.

The United States Court of Appeals for the Second Circuit granted a stay on January 4, 1972 and reversed the District Court's decision on April 26, 1972. The Court held that an affirmance by an equally divided vote was not an actual adjudication by the Supreme Court within the meaning of §2244(c). The Court of Appeals ruled that the Supreme Court was unable to reach a decision on the constitutional issues because of its equal division and thus the State court's decision remained in effect because there has been no federal adjudication of Radich's Federal constitutional rights.

The Court cited another provision of the Judicial Code, 28 U.S.C. §2109, as corroboration of Congress's view that a 4-4 decision by this Court is not an actual adjudication of constitutional claims within the purview of §2244(c). Section 2109 provides that when a case on review from a State court cannot be decided by the Supreme Court because of the lack of a quorum, "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

The Court of Appeals for the Second Circuit reversed and remanded to the District Court for consideration of the constitutional claims raised by the petition.

REASONS FOR DENYING THE WRIT

I.

There is no important question of Federal law and no conflict of decision.

The issue in the present case is, in the words of the Court of Appeals, "unlikely to recur" (2a)* and is too narrow to warrant review by this Court on certiorari. It can arise only in those few cases where a writ of habeas corpus is sought by a person whose State court conviction has been affirmed as a result of an equal division of this Court. The Court below found only six examples of equal division by this Court upon appeals from State court convictions since 1960.

The case does not in any sense broadly concern the habeas corpus jurisdiction of the Federal courts. It involves only the application of §2244(c) of the Judicial Code, which bars consideration in habeas corpus proceedings of issues which have been actually adjudicated by the Supreme Court in a prior appeal by the petitioner, in the unusual situation where the Supreme Court has been unable to reach a decision on such issues because it is equally divided.

To focus precisely on the dimensions of the issue presented for Supreme Court consideration, it may be pointed

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* Numbers in parentheses refer to the Appendix to the petition.

out that petitioners ask this Court to decide that its failure to reach agreement on a case is an actual adjudication, or real decision, of the issues presented by the appeal.

There is no conflict of decisions on this narrow issue. Two Courts of Appeal—for the Second Circuit in this case, and for the Sixth Circuit in *Neil* v. *Biggers*, 448 F.2d 91 (6th Cir. 1971) cert. granted —— U.S. ——, 40 U.S.L.W. 3410, 3415 (1972)—have ruled squarely that a 4-4 decision is not an actual adjudication of issues within the meaning of §2244(c) of the Judicial Code and does not bar a consideration of the same issues in a habeas corpus proceeding.

The writ of certiorari was granted in *Neil* v. *Biggers* when the District Court decision in respondent's case was pending on appeal to the Court of Appeals. At that time there was a possibility of a conflict between decisions of Courts of Appeals for the Sixth Circuit and for the Second Circuit. That possibility has been eliminated by the decision below; the circuits are now in accord. Petitioner therefore respectfully requests that the Court consider dismissing the writ of certiorari in *Biggers*, as well as denying the petition herein.*

In addition, the opinion of the Court below in the instant case cites a statute, Section 2109 of the Judicial Code, which respondent believes was not brought to the attention of this Court when it considered the application for a writ of certiorari in *Biggers*. 28 U.S.C. §2109, provides that in certain instances when a case on review in the Supreme

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* Respondent is, of course, aware that this is not the only issue raised in the petition for writ of certiorari in *Biggers* and accordingly, his request does not relate to the other issue.

Court cannot be decided because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

The use by Congress of an affirmance by an equally divided Court as the analogy for final disposition by affirmance when this Court cannot sit on an appeal, was cited by the Court below as corroboration of Congressional intention that only a majority decision of this Court would bar consideration of Federal claims in a habeas corpus proceeding.

II.

The decision below is clearly correct and in accordance with applicable decisions of this Court.

After a review of Congressional enactments authorizing Federal courts to entertain writs of habeas corpus by persons convicted in State court proceedings, the Court below concluded that in enacting Section 2244(c) Congress did not intend to deprive the habeas petitioner of his right to one federal adjudication of Federal constitutional issues merely because those issues had been previously raised before the Supreme Court. "Only if the Supreme Court had actually *decided* the issues would its adjudication be final". (8a). (Emphasis in original.) Since the very fact of an equal division meant that the Supreme Court was unable to reach such a decision, the Court held that under such circumstances there had been no adjudication of the issues.

In addition, the Court below stated:

> That Congress does not consider an affirmance by an equally divided court to be an actual adjudication of the merits is corroborated by its enactment of another provision of the Judicial Code, 28 U.S.C. §2109, which provides that in certain instances when a case on review in the Supreme Court cannot be decided because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.*" (Emphasis added.) See e.g., *Prichard* v. *United States,* 339 U.S. 974 (1950). This provision was enacted to allow final disposition of litigation when "appellate review has been had and further review by the Supreme Court is impossible. . . ." H.R. Rep. No. 308, 80th Cong., 1st Sess. A176 (1947). (9a).

Petitioners argue only that an affirmance by an equally divided Court constitutes an actual adjudication of the issues raised before the Court, first, because such affirmances are conclusive and binding upon the parties in civil cases; and second, because such affirmances differ from denials of writs of certiorari, which the legislative history of the subsection excepts from its purview.

The Court below properly rejected those arguments. Pointing out that the conclusive and binding effect of affirmances by an equally divided Supreme Court in civil actions is irrelevant to a habeas corpus proceeding, the Court of Appeals noted the statement that where there is an equal division " 'nothing is settled' by the Court, *Ohio ex rel.*

Eaton v. *Price*, 364 U.S. 263, 264 (1960) (opinion of Mr. Justice Brennan)." (10a).

Petitioners' second contention conflicts with their first: if civil cases are relevant, then it must be noted that the denial of a writ of certiorari in a civil case leaves in effect a judgment as final and binding upon the parties as a 4 to 4 affirmance. When neither party to a civil action petitions for a writ of certiorari, the judgment in effect is equally conclusive and binding. Yet habeas corpus is available to a criminal defendant whose petition for a writ of certiorari from a state conviction is denied or who does not petition for such a writ.

In review of the foregoing, the decision of the Court below is correct and accords with decisions of this Court with respect to its equally divided affirmances.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
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Respectfully submitted,

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